

The Honorable David G. Estudillo

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

GAVEN PICCIANO,

Plaintiff,

VS.

CLARK COUNTY, CLARK COUNTY
JAIL, WELLPATH, LLC, and NAPHCARE,
INC.,

Defendants.

Civil Action No. 3:20-cv-06106-DGE

**DEFENDANT WELLPATH, LLC'S MOTION
FOR SUMMARY JUDGMENT**

HEARING DATE: MAY 3, 2024

ORAL ARGUMENT REQUESTED

I. MOTION FOR SUMMARY JUDGMENT

COMES NOW Defendant, Wellpath, LLC (“Wellpath”) by and through its counsel of record, and hereby moves the Court pursuant to Fed. R. Civ. P. 56 for an order granting summary judgment dismissing Plaintiff’s Complaint against Wellpath. By this Motion, this Defendant seeks dismissal of any and all claims Plaintiff has asserted against Wellpath.

II. INTRODUCTION

Wellpath provided less than 35 hours of medical services while Plaintiff was an inmate at Clark County Jail. There is no clear evidence that during that time Plaintiff communicated to any Wellpath agent that he wanted a gluten free diet. In the intake form where he provided information

Defendant Wellpath, LLC's

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1 and signed, he did not indicate that he was on a medical diet. When specifically questioned at his
 2 deposition, he candidly admitted he did not recall the conversation with the Wellpath nurse.

3 Furthermore, he affirmatively represented to Wellpath's agents he would be released from
 4 the jail in approximately 12 hours after his first contact with Wellpath's agents. Wellpath's agents
 5 had no basis to question the Plaintiff's affirmative representations. At that time, Wellpath's agents
 6 also requested that Plaintiff sign a document that would allow the release of his medical records.
 7 He did indicate he had celiac disease and Wellpath was attempting to confirm that. However,
 8 Plaintiff refused to cooperate in obtaining that information at that time. He signed the document
 9 where he recognized the potential risk for doing so.

10 Finally, it is important to note that during the 35-hour period, there is no evidence that
 11 Plaintiff received any damages. Plaintiff himself testified he did not recall being sick or ill during
 12 that time. Plaintiff's expert expressed no opinion that Plaintiff specifically incurred any damage
 13 during that time period. She candidly admitted she did not know what he had eaten, if anything,
 14 during that period of time. She also admitted she did not have any evidence that he was sick or ill
 15 during that 35-hour period.

16 These undisputed facts alone mandate that summary judgment be granted to Wellpath.
 17 When you add in the legal issues, it creates an even significantly more basis requiring summary
 18 judgment in favor of Wellpath.

19 III. STATEMENT OF FACTS

20 A. RELEVANT PROCEDURAL BACKGROUND

21 Plaintiff filed a Complaint on November 11, 2020, against Clark County, Clark County
 22 Jail, and NaphCare, Inc. alleging numerous causes of action, thirteen (13) in total. Dkt. No. 1. On
 23 April 8, 2021, Plaintiff filed his First Amended Complaint, adding Wellpath, LLC, as a Defendant.
 24 Dkt. No. 27. Plaintiff maintained his thirteen (13) causes of action. Id. Plaintiff filed a Second

1 Amended Complaint (referred to herein as “Complaint”) on January 25, 2022, alleging against
 2 Wellpath, causes of action for violation of Section 504 of the Rehabilitation Act of 1973, 42 U.S.C.
 3 § 1983, The Washington Law Against Discrimination¹, Negligence, Negligent Infliction of
 4 Emotional Distress, and Outrage. Dkt. No. 43.

5 With regard to Wellpath’s Motion to Dismiss the First Amended Complaint, Dkt. No. 31,
 6 Plaintiff voluntarily dismissed counts 7, 8, 9, 11, 12, and 13 against Defendant Wellpath.
 7 Plaintiff’s remaining claims as to Defendant Wellpath were dismissed, as well, with leave to
 8 amend. Dkt. No. 42. On Wellpath’s Motion to Dismiss the Second Amended Complaint. Dkt. No.
 9 47. The Court granted in part, and denied in part, that Plaintiff’s **WLAD** claim was dismissed as
 10 to all defendants. Plaintiff’s **negligent** infliction of emotion distress claim was not dismissed
 11 Plaintiff’s **outrage** claim was not dismissed.

12 1. General background

13 On January 30, 2020, after being arrested for domestic violence and assault, Plaintiff was
 14 booked into Clark County Jail. Complaint, ¶ 23–24. At that time, Wellpath had a contract with the
 15 Jail to provide medical services. Id. ¶¶ 4, 19. The contract with Wellpath ended on midnight of
 16 January 31, 2020, and on February 1, 2020, Jail’s contract with NaphCare, Inc, for medical services
 17 began. Id. ¶¶ 5, 21.

18 2. Wellpath’s role at Clark County Jail

19 To remind this Court, Wellpath was contracted to provide medical services at the Clark
 20 County Jail. Complaint, ¶ 4. Wellpath was not contracted to provide nutritional or dietitian
 21 services. (Declaration of Jerome R. Aiken, hereinafter “Decl. of J. Aiken”, ¶ 11, Exhibit J).

22

23 ¹ This cause of action was dismissed with prejudice pursuant to this Court’s May 23, 2022, Order On Defendant
 24 Wellpath, LLC’s Motion To Dismiss The Second Amended Complaint.

1 Medical services is a different facet of services provided at Clark County Jail than food services.
 2 Id. at p. 153. Wellpath had no control over the Jail's kitchen. Id. Wellpath was not required to have
 3 a registered dietitian. Id. Wellpath was not responsible for assessing the nutrition or contents of
 4 the meals that Jail provided. Id. at p. 153–54.

5 Dietary or nutritional services, including the preparation of meals and review thereof to
 6 ensure compliance with nutritional or special needs, should not be conflated with the medical
 7 services that Wellpath agreed to provide, and did provide.

8 It is important to emphasize that under jail policy, a therapeutic or specialized diet (medical
 9 diet) could only be provided with the approval of a registered dietician or contract physician. There
 10 was no such approval during Wellpath's 35 hours of medical care.

11 3. Wellpath's written policy

12 There is some confusion regarding Wellpath's written policy. Wellpath's written policy
 13 only states that "medical diets are provided per provider order and documented in the health
 14 record." Also, that self-reported food allergies are determined by qualified healthcare
 15 professionals that includes nurses. (Decl. of J. Aiken, ¶ 11, Exhibit J). There is nothing in
 16 Wellpath's policies that a medical diet could only be ordered if records are obtained and a diagnosis
 17 is confirmed. It is clear under Wellpath's contract with Clark County Jail that a provider (which
 18 can be a physician, physician assistant, or ARNP (advanced registered nurse practitioner)) was on
 19 call 24/7. (Decl. of J. Aiken, ¶ 11, Exhibit J). Specifically, Plaintiff's expert Dr. Holliday testified
 20 such a policy is appropriate. (Decl. of J. Aiken, ¶ 3, Exhibit B, p. 215-221).

21 4. Plaintiff's representations at intake

22 As part of the intake process, Wellpath's agent registered nurse Tarah Ward (Crotty),
 23 questioned Plaintiff about his health history as well as other issues. (Declaration of Tarah Ward,
 24 (hereinafter "Decl. of Ward"), ¶ 5). During the intake screening, Plaintiff did state he is allergic

1 to gluten. He also stated he is currently being treated by a physician for celiac disease. His
 2 response to the specific question: "Are you on a specific diet prescribed by a physician? If yes,
 3 explain" was "**No.**" (Decl. of J. Aiken, ¶ 10, Exhibit I). (Emphasis supplied).

4 5. Plaintiff executed a document entitled a document entitled "Refusal of Treatment"

5 Also, at the time of intake, Nurse Ward wanted to obtain Plaintiff's medical record to
 6 confirm he had celiac disease. (Decl. of Ward, ¶ 10). Nurse Ward described that document to
 7 Plaintiff in detail. She explained to him the consequences of not agreeing to provide his medical
 8 records. Plaintiff signed the document. (Decl. of Ward, ¶¶ 15-18).

9 That document states in part:

10 I acknowledge that I have been fully informed of and understand the above refused
 11 treatment and the acts and risks involved in refusing. I hereby release and agree to
 12 hold harmless CCS and correctional personnel from all responsibility and any ill
 13 effects which may result from this refusal.

14 (Decl. of Ward, ¶ 19, Exhibit B).²

15 6. Inmate request slip dated 1/31/2020

16 On January 31, 2020, Plaintiff prepared a "Inmate Request Slip" also known as a kite.
 17 (Decl. of Ward, ¶ 22, Exhibit C). In that kite, he indicated he had celiac disease and that he required
 18 a strict gluten free diet.

19 There is no evidence that Wellpath received that document on January 31, 2020. Plaintiff
 20 admits he did not see any healthcare providers on that date. He admits he did not learn that he was
 21 not going to be released from jail until late that day after business hours. (Decl. of J. Aiken, ¶ 10,
 22 Exhibit I). It is clear that the document is not filled out correctly because it does not indicate to

23 2 This is demonstrated by exhibits in Plaintiff's possession used at the deposition of Wellpath's agent Mr. Lamb.
 24 (Decl. of J. Aiken, ¶ 8, Exhibit G).

1 whom the request is specifically directed. The information from witnesses is that Wellpath would
 2 not have received that by midnight of January 31, 2020. (Decl. of Ward, ¶ 22).

3 7. Pertinent facts after Wellpath ceased providing medical care

4 Plaintiff finally agreed to sign a release for his medical records on February 3, 2020.
 5 Complaint, Dkt No. 27, ¶ 43. On or about February 6, 2020, NaphCare received Plaintiff's medical
 6 records and thereafter ordered the Plaintiff be placed on a special gluten free diet. Id., ¶ 53.
 7 However, Plaintiff alleges even after a gluten free diet was ordered, he continued to receive meals
 8 that contained gluten resulting in exposure to ingestion of gluten. Id., ¶¶ 53, 56, 59, 62, 68, 71.
 9 Nevertheless, Plaintiff's own expert has admitted that even if Plaintiff ingested gluten food, he
 10 suffered no long-term consequences. (Decl. of J. Aiken, ¶ 3, Exhibit B).

11 Plaintiff did not see a mental health professional on January 31, 2020. That demonstrates
 12 the issue of food was addressed, but apparently not a concern of Plaintiff. (Decl. of J. Aiken, ¶ 3,
 13 Exhibit B).

14 8. Admissions by Plaintiff

15 For the convenience of Court, we will refer to admissions made by Plaintiff in his
 16 deposition in the order of the pages in the deposition where he so testified.

- 17 • Plaintiff stated that other than not being able to ingest gluten, celiac disease
 does not really impact his life. (Decl. of J. Aiken, ¶ 10, Exhibit I at 30:18-
 32:19).
- 18 • He testified that as long as he maintains a strict gluten free diet, that his
 celiac disease does not have much of an impact on his life. Id. at 32:11-14,
 35:20-36:3).
- 19 • Plaintiff testified that at the time of intake he really does not recall anything
 that happened because according to him he was in shock and felt like he
 was in a dream, did not know what was going on. Id. at 72:6-10
- 20 • He stated he was not to sign the Refusal of Treatment form. Id. at 73:12-
 14, 22-25, and 74:1-2.
- 21 • He told the intake person that he was going to get out the next day. Id. at
 74:9-17.

- 1 • He testified he does not recall what was discussed with him regarding the
Refusal of Treatment form. Id. at 75:17-25, 76:1-8.
- 2 • He admits that he signed the Refusal of Treatment document. Id. at 75:17.
- 3 • He learned he was not going to get out of jail until late in the afternoon and
it becoming after the business day. Id. at 77:5-10, 78:8-11.
- 4 • Plaintiff testified that having celiac disease or gluten intolerance and
disability are distinct things. Id. at 90:22-91:2.
- 5 • He testified that the first time he received any food while at the jail was on
Friday morning, January 31, 2020. However, he does not know what he
was served that day or what he ate that day. Id. at 104:5-24.
- 6 • He admits he has not seen a healthcare provider regarding alleged celiac
issues since over four years ago. Id. at 149:25, 160:1-10.
- 7 • He testified he does not know if he vomited during the time that Wellpath
was providing care. Id. at 154:15-25, 155:1-4.
- 8 • He cannot recall whether he lost any weight during the time that Wellpath
was providing care. Id. at 155:5-13.
- 9 • He admitted he was educated on what goods contained gluten and that he
had had a good idea during the time he was incarcerated he knew what items
on his food would be gluten free. Id. at 167:8-25, 168:1-19.
- 10 • He admitted he does not know if he was told he cannot receive a medical
diet until he signed a release. Id. at 181:6-25, 182:1-4.

12 9. Wellpath did not receive federal funding

13 After thorough investigation in this matter, Wellpath has continually represented it does
14 not receive federal funding. Dkt. Nos. 136 and 137. It is undisputed that it certainly did not receive
15 any federal funding for its care at Clark County Jail. The only payments it received was under the
16 specific contract it had with Clark County.

17 **IV. LEGAL ARGUMENT AND AUTHORITY**

18 **A. SUMMARY JUDGMENT STANDARD**

19 This Court is well aware of the summary judgment standard in federal court. Thus, we will
20 not burden the Court in discussing it at length. Nevertheless, it is well to remember what the U.S.
21 Supreme Court stated regarding summary judgments in the seminal case of Celotex Corp. v.
22 Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

23 The Federal Rules of Civil Procedure have more than 50 years to authorize motions
24 for summary judgment upon proper showing of the lack of a genuine, triable issue

of material fact. Summary Judgment procedure is properly guarded, not as a favorable procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed “to secure the just, speedy, and inexpensive determination of every action.” . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of a person opposing such claims and defenses to demonstrate in the manner provided by the rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 106 S. Ct. at 255.

As to Wellpath, this is such a case where the Plaintiff’s claims against Wellpath have no factual basis. Moreover, they have no legal basis.

B. THE COURT MUST DISMISS ANY CLAIMS BROUGHT UNDER 42 USC § 1983

1. For §1983 liability Plaintiff must establish that Wellpath had a custom, policy or practice of deliberate indifference to detainees’ medical needs

Under Monell §1983 entity liability must be based upon “(1) an official policy; (2) a pervasive practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker.” Horton by Horton v. City of Santa Maria, 915 F.3d 592, 602-03 (9th Cir. 2019).

The standard of §1983 liability against a private entity is the same as that against a governmental entity:

To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right secured by the Constitution and laws of the United States, and (2) that the deprivation was committed by a person acting under color of state law.”....

To create liability under § 1983, the constitutional violation must be caused by “a policy, practice, or custom of the entity,”... or be the result of an order by a policy-making officer.... Whether *Monell* applies to suits against private entities under § 1983 is a threshold question with regard to [private entity] will liability because, if it does, *Monell* establishes the parameters of such liability.

Every one of our sister circuits to have considered the issue has concluded that the requirements of *Monell* do apply to suits against private entities under §

1 1983. ... Like those circuits, we see no basis in the reasoning underlying *Monell* to
 2 distinguish between municipalities and private entities acting under color of state
 law.

3 As *Monell* observed, the text of § 1983 “cannot be easily read to impose
 4 liability vicariously on governing bodies solely on the basis of the existence of an
 employer-employee relationship with a tortfeasor.” 436 U.S. at 692, 98 S.Ct. 2018.
 On the contrary, the Court observed, Congress explicitly provided “that A’s tort
 5 became B’s liability if B ‘caused’ A to subject another to a tort.” *Id.* Thus, the Court
 held, “constitutional deprivations” could subject a municipality to liability under §
 6 1983 if they were the result of a “governmental ‘custom’ ” sufficient to establish
 causation. *Id.* at 690–91, 98 S.Ct. 2018. It would be odd indeed to suggest that this
 7 interpretation has less force in the context of a suit against a private entity....

8 To make out a claim against [a private entity] under *Monell*, [the plaintiff]
 must show that (1) [the private entity] acted under color of state law, and (2) if a
 9 constitutional violation occurred, the violation was caused by an official policy or
 custom of [the private entity]....

10 Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1138–39 (9th Cir. 2012).

11 For purposes of this Motion only, Wellpath is not contesting that it’s contract to provide
 12 medical services with Clark County constitutes the requisite state action under West v. Atkins, 487
 13 U.S. 42 (1988).

14 “To establish liability, a plaintiff must establish that he was deprived of a constitutional
 15 right and that the [entity] had a policy, practice, or custom which amounted to ‘deliberate
 16 indifference’ to the constitutional right and was the ‘moving force’ behind the constitutional
 17 violation.” Levine v. City of Alameda, 525 F.3d 903, 907 (9th Cir. 2008).

18 Plaintiff must demonstrate that the official policy “evidences a ‘deliberate indifference’ ”
 19 to his constitutional rights, and this occurs “when the need for more or different [action] is so
 20 obvious, and the inadequacy [of the current procedure] so likely to result in the violation of
 21 constitutional rights, that the policymakers ... can reasonably be said to have been deliberately
 22 indifferent to the need.” City of Canton, Ohio v. Harris, 489 U.S. 378, 389-390, 109 S. Ct. 1197,
 23 1205 (1989).

1 2. Deliberate indifference requires more than mere negligence, misdiagnosis (i.e.
 2 failure to recognize) or failure to diagnose

3 A deliberate indifference standard is applicable to pretrial detainees under a 14th
 4 amendment due process analysis where the claim is based upon failure to provide treatment. Castro
 5 v. Cty. of Los Angeles, 833 F.3d 1060, 1067–68 (9th Cir. 2016). Liability may be imposed if the
 6 healthcare provider “ ‘knows that inmates face a substantial risk of serious harm and disregards
 7 that risk by failing to take reasonable measures to abate it.’ ... [T]he plaintiff must show that the
 8 [defendant] acted with "deliberate indifference." Id.

9 Deliberate indifference is more than negligence and is the equivalent of reckless disregard.
 10 Gordon v. Cty. of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018) (pretrial detainee; "the plaintiff
 11 must "prove more than negligence but less than subjective intent—something akin to reckless
 12 disregard."). A plaintiff must establish that the defendant "made an intentional decision with
 13 respect to" the plaintiff's treatment. Id. "[A]n inadvertent failure to provide adequate medical care"
 14 does not, by itself, state a deliberate indifference claim for § 1983 purposes." Wilhelm v. Rotman,
 15 680 F.3d 1113, 1122 (9th Cir. 2012). A misdiagnosis or failure to diagnose a condition is
 16 insufficient as a matter of law under § 1983. Id. at 1123 (summary judgment dismissal of healthcare
 17 provider without actual knowledge of the condition affirmed).

18 Thus, "a plaintiff's showing of nothing more than a difference of medical opinion as to the
 19 need to pursue one course of treatment over another [is] insufficient, as a matter of law, to establish
 20 deliberate indifference." Id. at 1122. Plaintiff's expert Dr. Holliday admitted that a policy such as
 21 Wellpath's required that a provider order a medical diet is appropriate. (Decl. of J. Aiken, ¶3,
 22 Exhibit B, 215:1-25, 216:1-25, 217:1-25, 218:1-25).

23 Moreover, mere delay of providing medical treatment, "without more, is insufficient to
 24 state a claim of deliberate medical indifference... unless the denial was harmful." Shapley v.

1 Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985) (citing Estelle v. Gamble,
 2 429 U.S. 97, 97 S.Ct. 285 (1976)); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989) (quoting
 3 Shapely). Here, there is no testimony. There is no evidence that the 35 hours was harmful.

4 Deliberate indifference is evaluated under an objective standard. Gordon, 888 F.3d at 1124-
 5 1125. “[T]he defendant’s conduct must be objectively unreasonable” and “‘mere lack of due care’”
 6 is insufficient. Id. at 1125.

7 3. There is no evidence that Wellpath acted with deliberate indifference to Plaintiff's
medical dietary needs, or that any such deliberate indifference resulted in harm

8 Here there is actually no evidence that employer Wellpath (to be distinguished from the
 9 actions of its employees) acted with deliberate indifference with regard to the Plaintiff's medical
 10 needs. There is no evidence of any (1) Wellpath policy practice or custom which amounts to
 11 deliberate indifference, (2) decision or act by a Wellpath final policymaker which amounted to
 12 deliberate indifference, or (3) a failure to train or supervise by Wellpath which amounted to
 13 deliberate indifference.

14 §1983 Monell liability claims against an entity may be dismissed as a matter of law when
 15 there is no evidence of the existence of any policy, practice, custom, decision or act by a final
 16 policymaker, or a failure to train or supervise, which in and of itself amounts to deliberate
 17 indifference. Ramirez v. Las Vegas Metro. Police Dep't, 22 F. App'x 828, 830-31 (9th Cir. 2001)
 18 (msj affirmed where no evidence of the employing entity's (1) having a policy promoting
 19 deliberate indifference to detainees' medical needs, (2) persistent and widespread custom of being
 20 deliberately indifferent to detainees' medical needs (excluding isolated or sporadic incidents), and
 21 (3) an inadequate training program that amounts to deliberate indifference); Levine, supra, at 907
 22 (msj affirmed; no evidence of a policy that amounted to deliberate indifference to constitutional
 23 rights, and was the moving force behind a violation of those rights); Murray v. Idaho, 315 F. App'x
 24

1 639, 641 (9th Cir. 2009)(msj affirmed; no evidence of a policy or custom amounting to deliberate
 2 indifference to constitutional rights); Hancock v. Clark Cnty., 285 F. App'x 447, 449 (9th Cir.
 3 2008) (same); Darby v. California, Dep't of Soc. Serv., 1 F. App'x 688, 690 (9th Cir. 2001) (msj
 4 affirmed; plaintiffs did not present sufficient evidence that the County had a policy or custom that
 5 amounted to deliberate indifference).

6 The evidence before the Court establishes that Wellpath only provided services for
 7 approximately 35 hours during the Plaintiff's incarceration, that on initial screening Plaintiff
 8 indicated having celiac disease (i.e. gluten intolerance) but stated he was not on a specific diet
 9 prescribed by a physician. Furthermore, the record shows Wellpath's medical diet policy
 10 (including for celiac disease) are "provided per provider order and documented in the health
 11 record" and that "diets related to self-reported food allergy are determined by Qualified Health
 12 Care Professional" (which includes nurses). Furthermore, upon booking Plaintiff refused to
 13 execute a medical release of information so his celiac disease could be confirmed and also signed
 14 a "Refusal of Treatment" form because he was "getting out tomorrow."

15 Additionally, and perhaps more significantly, there is no evidence of Plaintiff suffering any
 16 damages during the 35 hours when Wellpath was providing care. Plaintiff's medical expert cannot
 17 state that Plaintiff incurred any damages during this time.

18 4. Plaintiff cannot establish the causation element of a 1983 action

19 In a 1983 action, a plaintiff must also establish causation. "The fourth element of causation,
 20 requires actual and proximate cause. Even in analyzing § 1983 claims, the court looks to traditional
 21 tort law to determine causation, including whether intervening causes have broken the chain of
 22 proximate cause." Moriarty v. County of San Diego, 219 WL 4643602 at 26 (citing Leer v.
 23 Murphy, 844 F.2d 626 (9th Cir. 1988); Van Ort v. Estate of Stanewich, 92 F.3d 831 (9th Cir. 1986).
 24 The Van Ort case equates the necessary proximate cause element to "but for" causation. The

1 analysis of causation must be individualized and focused on the duties and responsibilities of each
 2 individual defendant. Lima-Flores v. Underell, 2022 WL 18118 at 1 (Dist. of Or. 2022).

3 We direct the Court's attention to the discussion of common law and proximate cause
 4 contained in the discussion of Plaintiff's negligence claim. There is no "but for" causation here as
 5 discussed in that analysis.

6 **C. PLAINTIFF'S REHABILITATION ACT CLAIMS MUST BE DISMISSED FOR
 7 FAILURE TO PROVIDE EVIDENCE ESSENTIAL ELEMENTS OF THE
 REHABILITATION ACT CLAIM**

8 1. Elements of a Rehabilitation Act claim

9 "Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act.⁸ A
 10 plaintiff bringing suit under § 504 must show (1) he is an individual with a disability; (2) he is
 11 otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by
 12 reason of his disability; and (4) the program receives federal financial assistance." Duvall v. Cnty.
 13 of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001); Wragg v. Ortiz, 462 F.Supp.3d 476, 511 (D. N.J.
 14 2020).

15 2. There is no evidence that Wellpath was a recipient of federal financial assistance

16 Prior filings with this court (Dkt. Nos. 136 and 137) demonstrate that Wellpath does not
 17 receive federal financial assistance. Furthermore, Plaintiff can produce no evidence to contradict
 18 this fact. The fact that Wellpath contracted with a government entity which may have received
 19 federal financial assistance does not make Wellpath a recipient of federal financial assistance as a
 20 matter of law. Castle v. Eurofresh, 731 F.3d 901, 908-909 (9th Cir. 2013).

21 Rehabilitation Act liability is imposed only on "those who affirmatively choose to receive
 22 federal aid" but such liability "will not extend as far as those who benefit from it...". Id. at 908. A
 23 contractor who provides services to an entity which is a recipient of federal financial assistance in
 24 //

1 which may be paid from such assistance is not in and of itself subject to the Rehabilitation Act. Id.
 2 at 908-909 (affirming dismissal of Rehabilitation Act claim against state contractor).

3 3. There is no evidence that Plaintiff had a “disability” within the meaning of the
Rehabilitation Act

4 In this case, Plaintiff claimed disability is alleged to be celiac disease (reaction to gluten).

5 The Rehabilitation Act only applies to individuals with a “disability.” 29 USC §794 (a)
 6 (contained within Subchapter V). The definition of “disability” is the same as that provided within
 7 the ADA at 42 USC §12102 (1). 29 USC §705(9)(B). “There is no significant difference in analysis
 8 of the rights and obligations created by the ADA and the rehabilitation Act.” Whitall v. Munk,
 9 2023 WL 4397949 at*1 (9th Cir. 2023) (quoting Zukle v. Regents, 366 F.3d 11, 1045 n. 11 (9th
 10 Cir. 1999)).

11 “But, having celiac disease, without evidence of it being disabling, is an insufficient basis
 12 for a colorable... claim.” Holt v. Rural Health Svcs. 2024 WL 377991 at *2 (D. S.C. 2024) (merely
 13 having celiac disease and being treated for celiac disease without evidence of disabling conditions
 14 insufficient; ADA claim dismissed). The Holt court, citing Ninth Circuit authority, held that a mere
 15 “dietary restriction” was legally insufficient:

16 [t]hough ... eating is a major life activity, we do not ... invite all those on a diet to
 17 bring claims of disability. Not every impediment to the copious and tasty diets our
 18 waistlines and hearts cannot endure is a substantial limitation of the major life
 19 activity of eating. We must carefully separate those who have simple dietary
 20 restrictions from those who are truly disabled.

21 Holt, at *2-3 (quoting Fraser v. Gondale, 342 F.3d 132, 1041 (9th Cir.2003)). See, also, Nolan v.
Vilsack, 2016 WL 3678992, at*5 (C.D. CA. 2016) (granting summary judgment where plaintiff
 22 admitted celiac disease did not significantly affect his work or day-to-day living).

23 As set forth in codefendant Naphcare’s Summary Judgment Memorandum, Plaintiff admits
 24 that as long as he maintains his gluten-free diet there is not much of an impact in this life, there

1 are no other ways that celiac disease impacts his life, and does not equate gluten intolerance with
 2 a disability indicating those are “kind of two different things.” Dkt. No. 141, p. 22. He also has
 3 not seen a healthcare provider for celiac related issues for over four years.

4. There is no evidence that Plaintiff was damaged by not being provided gluten-free
meals during the 35 hours of Wellpath involvement

5 Finally, the records reflect that in the 35 hours of Wellpath involvement, Plaintiff never
 6 communicated that he wanted to gluten free diet, signed a form of refusal of treatment, and there
 7 is no evidence of any damage to Plaintiff provided a gluten-free diet, including from the testimony
 8 of his expert. (Decl. of J. Aiken, ¶ 4, Exhibit C).

9 **D. PLAINTIFF CANNOT ESTABLISH THE EXTREMELY RIGOROUS CLAIM OF**
OUTRAGE

11 One of the Washington state claims the Plaintiff is alleging in this case is a claim based
 12 upon the tort of outrage. Washington law on that tort demonstrates its an extremely difficult claim
 13 to establish under Washington law. It is a claim that is frequently dismissed by summary judgment
 14 as demonstrated by the numerous appellate court cases upholding the trial court’s decision
 15 dismissing that difficult claim. See, e.g., Reid v. Pierce County, 136 Wn.2d 195, 961 P.2d 333
 16 (Jackson v. People’s Federal Credit Union, 25 Wn. App. 81, 604 P.2d 1025 (1979);
 17 Dicomes v. State, 113 Wn.2d 612, 682 P.2d 1002 (1989); Sutton v. Tacoma School Dist. No. 10,
 18 180 Wn. App. 859, 324 P.3d 763 (2014).

19 Under Washington law, a trial court essentially acts as a gatekeeper in analyzing these
 20 claims. The trial court must decide whether based upon the undisputed facts that the conduct arises
 21 to the extremely high level necessary to establish a claim of outrage. The trial judge must initially
 22 as a matter of law determine if reasonable minds can differ on whether the conduct was sufficiently
 23 extreme to result in liability. Robel v. Roundup Corp., 148 Wn.2d 335, 351, 59 P.3d 611 (2020);
 24 Spicer v. Patnode, 9 Wn. App. 2d 283, 443 P.3d 801 (2019).

1 In order for Plaintiff to survive a summary judgment motion on this claim and present a
 2 prima facie case, the Plaintiff must prove three distinct elements. They are: "(1) extreme and
 3 outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) an actual
 4 result to the plaintiff of severe emotional distress." Christian v. Tohmeh, 191 Wn. App. 709, 738,
 5 366 P.3d 16 (2015).

6 Under Washington law, conduct to be constituted outrageous conduct must be extreme. It
 7 must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds
 8 of decency, and be regarded as atrocious and utterly intolerable in a civilized community."
 9 Grimsby v. Sampson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975); Birklid v. Boeing Co., 122 Wn.2d
 10 853, 867, 904 P.2d 278 (1995).

11 Washington courts in determining whether conduct is sufficiently outrageous to constitute
 12 the tort of outrage must consider "the position occupied by the defendant. . . ." Phillips v.
 13 Hardwick, 29 Wn. App. 382, 388, 628 P.2d 506 (1981); Birklid v. Boeing Co., 122 Wn.2d 853,
 14 867, 904 P.2d 278 (1995). Here, the position occupied by Wellpath's agent was unique and very
 15 different than the position occupied by the other Defendant told by Plaintiff he was being released
 16 in approximately 12 hours. That fact alone demonstrates Plaintiff cannot establish the tort of
 17 outrage as to Wellpath.

18 The position of Wellpath and its agents was that they were specifically told by the Plaintiff
 19 that he was being released in approximately 12 hours. Thus, there was no urgency demonstrated
 20 as to his condition. This fact alone demonstrates that Plaintiff cannot establish the outrage as to
 21 Wellpath. Moreover, he reported to Wellpath that he was not on any physician prescribed diet.
 22 Finally, he signed a refusal of treatment form waiving his claims here and precluding Wellpath to
 23 further investigate his claim of celiac disease.

24 ///

1 Washington courts have analyzed the claims of tort of outrage in the area of providing
 2 medical services to a person. There are at least two cases in Washington that have done so,
 3 Christian v. Tohmeh, 191 Wn. App. 709, 738, 366 P.3d 16 (2015) and Benoy v. Simon, 66 Wn.
 4 App. 56, 831 P.2d 167 (1992). In both cases, the Washington appellate courts have upheld
 5 summary dismissal of the plaintiff's tort of outrage claim. A review of both of those cases reveal
 6 that the conduct alleged in those cases was exponentially more extreme than the conduct alleged
 7 here.

8 We will discuss the Washington appellate court case of Christian v. Tohmeh, 191 Wn. App.
 9 709, 366 P.3d 16 (2015) to exemplify this. Significantly, in Christian, it was alleged that the
 10 physician involved participated in a pattern of intentional behavior to obfuscate a true diagnosis in
 11 an attempt to avoid legal liability. The physician yelled and shouted at the plaintiff. The physician
 12 told the plaintiff that her neurological deficits were psychosomatic and implied to the patient that
 13 she was lazy and obese. He finally harangued another doctor in an attempt to influence that
 14 physician's diagnosis while also minimizing the patient's history by reporting that the patient
 15 suffered from significant emotional and psychological issues. Finally, the plaintiff then contended
 16 the physician referred the patient to a urologist who found the medical condition at issue and
 17 confirmed a diagnosis, but the defendant reported to the patient that that physician's findings were
 18 normal. Id. at 737-38.

19 Obviously, such claims are far more extreme and outrageous than anything alleged here.
 20 Yet, in Christian, the appellate court had no difficulty in concluding they did not raise to the
 21 extreme level of outrageous conduct under Washington law.

22 It should also be noted there is no evidence whatsoever that the Plaintiff suffered severe
 23 emotional distress during the 35 hours of care by Wellpath. There is no evidence in fact that the
 24 Plaintiff ingested any gluten food. There is no evidence Plaintiff became ill at all during that

1 period. The Plaintiff's only damage expert, Dr. Huj Joel did not express any opinions on that
 2 specific issue.

3 **E. THERE IS NO VIABLE CLAIM FOR NEGLIGENT INFILCTION OF
 4 EMOTIONAL DISTRESS UNDER WASHINGTON LAW**

5 Another one of the Plaintiff's claims that is a Washington law claim, is a claim asserting
 6 the tort of negligent infliction of emotional distress. "The tort of negligent infliction of emotional
 7 distress is a limited, judicially created cause of action." Colbert v. Moomba Sports, Inc., 163
 8 Wn.2d 43, 49, 176 P.3d 497 (2008). Plaintiff may only recover for negligent infliction of
 9 emotional distress by proving duty, breach, proximate cause, damage, and objective
 10 symptomatology. Kumar v. Gate Gourmet, Inc., 180 Wn.2d 481, 505, 325 P.3d 193 (2014).
 11 Similar to the tort of outrage, there are three essential elements to such a claim. Plaintiff must
 12 prove (1) the emotional distress is within the scope of foreseeable harm of Wellpath's conduct,
 13 (2) plaintiff reasonably reacted given the circumstances, and (3) objective symptomatology
 14 confirms his distress. Bylsma v. Burger King Corp., 176 Wn.2d 555, 560, 293 P.3d 1168 (2013).
 15 None of the three elements are met here.

16 To be foreseeable, "the harm sustained must be reasonably perceived as being within the
 17 general field of danger covered by the specific duty owed by the defendant." Christian v. Lee, 113
 18 Wn.2d 479, 492, 780 P.2d 1307 (1989); Maltman v. Sauer, 84 Wn.2d 975, 981, 530 P.2d 284
 19 (1975). Where reasonable minds cannot differ, this Court can decide the issue of foreseeability as
 20 a matter of law. Schooley v. Pinch's Deli Mkt. Inc., 134 Wn.2d 468, 477, 951 P.2d 749 (1989).
 21 There can be no foreseeability here. The Plaintiff never indicated that he had been prescribed or
 22 wanted a gluten free diet. The nurse, although knowing he had celiac disease, did not know to
 23 what extent he claimed he had celiac disease or what would happen to him if he ate some foods
 24 containing gluten. That was never communicated by Plaintiff to Wellpath's agent. Furthermore,

1 Wellpath's agents were led to believe that Plaintiff would be out of the jail within 12 hours. Thus,
 2 it is a reasonable belief that during that 12-hour period, Plaintiff would get by without good
 3 containing gluten. Even if they assumed he could not eat any such food.

4 Perhaps more significantly, "a plaintiff must prove he has suffered emotional distress by
 5 'objective symptomatology' and the 'emotional distress must be susceptible to medical diagnosis
 6 and proved through medical evidence.'" Kloepfel v. Bokor, 149 Wn.2d 192, 196-97, 66 P.3d 630
 7 (2003) (emphasis supplied). Plaintiff has submitted the testimony of no mental health expert to
 8 establish that Plaintiff suffered any emotional-type distress. Further, there is no medical evidence
 9 that Plaintiff suffered any damages during the 35-hour period of Wellpath's care. Plaintiff's only
 10 real expert on this, Dr. Hujoel, candidly admitted she did not know what, if anything, Plaintiff
 11 ingested as food during that period and did not know specifically if he had any type of symptoms
 12 whatsoever during that 35-hour period.

13 As a way of contrast, it is enlightening to view Washington cases where the court
 14 determined that a sufficient claim of negligent infliction had been presented to avoid summary
 15 judgment. In Strong v. Terrell, 147 Wn. App. 376, 195 P.3d 977, rev. denied, 165 Wn.2d 1057
 16 (2009), where the plaintiff's supervisor made demeaning comments about her blond hair until she
 17 died it brown, mocked her house as well as her husband's employment, called her a "bum mother,"
 18 spit in her face as he screamed at her for using the wrong bulletin board, and stood so close to her
 19 during a screaming fit that spittle contacted her face, causing her fear that he would strike her and
 20 the plaintiff claimed that this behavior caused her to vomit, having anxiety attacks, depression, and
 21 heart palpitations. The court found the facts sufficient to go past a summary judgment. Id. at 380,
 22 388-89. Also, where a funeral home failed to provide ashes in a burial urn and the decedent's
 23 mother hand sifted through the ashes, mistaking them for packing material, the court found those
 24 // /

1 allegations sufficient. Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn2d 959, 962, 577 P.2d
 2 580 (1978).

3 Here, the facts do not rise even close to those levels. Again, the fact that Plaintiff never
 4 clearly informed Wellpath agents that he wanted a celiac diet during the 35-hour period,
 5 affirmatively stating he was getting out within 12 hours after providing a history to Wellpath, and
 6 refusing to sign a release of medical information to confirm even that he had celiac disease,
 7 conclusively demonstrates the conduct here is not sufficient to satisfy the elements of a negligent
 8 infliction of emotional harm. More significant, as identified above, in the 35-hour period there is
 9 nothing to show that Plaintiff's condition was susceptible to a medical diagnosis and it certainly
 10 was not proved through any medical evidence. While Plaintiff in his Complaint alleges he suffered
 11 "fear and anxiety" (Dkt. 43, ¶ 136), he provided no medical evidence supporting that factual
 12 unsupported conclusory statement. Further, Plaintiff does not identify any actual medical
 13 diagnosis from a medical care provider. Thus, with no emotional distress provable through
 14 medical evidence, the claim of negligent infliction of emotional distress must be dismissed.

15 **F. PLAINTIFF CANNOT ESTABLISH A WASHINGTON COMMON LAW CLAIM
 16 OF NEGLIGENCE AGAINST WELLPATH**

17 An additional Washington state claim Plaintiff is making in this case against Wellpath is a
 18 negligence claim.³ The elements of a negligence claim in the state of Washington are the
 19 traditional four elements of a negligence claim. "Essential elements of an action of negligence
 20 are: (1) the existence of a duty owed to the complaining party; (2) the breach of that duty; (3) a
 21
 22

³ We tremendously respect this Court's decision that this matter is not covered by Washington's medical malpractice law including RCW Chapter 7.70. We continue to respectfully disagree with that decision and believe this is the epitome of a medical malpractice claim under Washington law. By discussing this as an ordinary Washington negligence claim, we are not meaning in any way to waive or abandon that argument.

1 resulting injury; and (4) a proximate cause between the breach and the industry. Christen v. Lee,
 2 113 Wn.2d 479, 488, 780 P.2d 1307 (1989).

3 1. Breach of duty not demonstrated

4 This Court has ruled that at least as to Wellpath, this is not a medical malpractice case
 5 governed by RCW Chapter 7.70. Thus, under Washington law this is what is known as a medical
 6 negligence case as to be distinguished from a medical malpractice case. Volk v. DeMeerleer, 187
 7 Wn.2d 241, 254, 366 P.3d 254 (2016).

8 The significance of this is explained in Watson v. Washington Dept. of Corrections, 218
 9 WL 7150488 (Western District of Washington 2018). This case is also important because it
 10 distinguishes the unreported decision of Division II of the Washington Court of Appeals relied
 11 upon by this Court in Dkt. 132 at 10, Gonzalez v. Dammeier County of Pierce, 2022 WL 1155744
 12 (2022).

13 One of the issues addressed in the Watson case was plaintiff's contention that they did not
 14 need expert testimony because it was a medical negligence case, not a medical malpractice case.
 15 In making this argument, plaintiff relied upon Peterson v. State, 100 Wn.2d 421, 671 P.2d 230
 16 (1983), the same case relied upon in the Gonzalez case. In addressing this argument, the court in
 17 Watson held:

18 Plaintiff is incorrect; as noted above, plaintiff's characterization of this claim as
 19 medical negligence rather than malpractice, does not change his burden. . . . In the
 20 case that plaintiff cites, the Supreme Court of Washington contrasted medical
 21 malpractice claims with ordinary negligence claims, not medical negligent claims.
 22 . . . The latter are equivalent to medical malpractice claims in their proof
 23 requirements.

24 Watson v. Washington Dept. of Corrections, 218 WL 7150488, at 8 (W.D. 2018) (citations
 25 omitted). The holding in the Watson case is consistent with Washington law. Washington law
 26 treats negligence claims dealing with professionals differently. Under Washington law, generally
 27

1 an expert is required to establish the negligence of most professionals outside the medical
 2 malpractice area. This includes actions against professionals such as lawyers, accountants,
 3 engineers, architects, and land surveyors. See, e.g., Slack v. Luke, 192 Wn. App. 909, 916-17,
 4 370 P.3d 49 (2016); Donatelli v. D.R. Strong Consulting Engineers, Inc., 179 Wn.2d 84, 312 P.3d
 5 620 (2013); 16 Washington Practice, Tort Law & Practice §16.1, 16.39, 16.41 (5th Ed. 2023
 6 update).

7 The Plaintiff has no such expert testimony in this case. This case involved Wellpath agents
 8 who were registered nurses' involvement with Plaintiff on January 30 and 31, 2020. The Plaintiff's
 9 expert Dr. Holliday candidly admitted in his deposition he was not competent to testify on the
 10 nursing standard of care. (Decl. of J. Aiken, ¶ 3, Exhibit B).

11 The lack of expert testimony to support Plaintiff's Washington negligence claim is fatal to
 12 that claim. It must be dismissed.

13 2. Plaintiff cannot establish the proximate cause element of a negligence action

14 Plaintiff has alleged and submitted facts that he was provided food containing gluten even
 15 after it was ordered he have a gluten free diet. That allegation of the Plaintiff establishes that
 16 Plaintiff cannot establish the element of proximate cause as to Wellpath. Well-established
 17 Washington law makes this conclusion inevitable.

18 It has long been the law in the state of Washington there can be no proximate cause if the
 19 injury would have occurred regardless of the alleged negligence of the defendant. See, e.g., Lunt
v. Spokane Skiing Corp., 62 Wn. App. 353, 814 P.2d 1189, rev. denied, 118 Wn.2d 1007 (1991);
21 Melville v. State, 115 Wn.2d 34, 793 P.2d, 952 (1990). This rule is also correctly delineated in
 22 the Washington Pattern Instructions which demonstrate that to establish proximate cause the
 23 plaintiff must establish the injury would not have happened in the absence of the cause. 6
 24 Washington Practice, Washington Pattern Jury Instruction, Civil WPI 15.01, 15.01.01 (7th Ed.).

1 This is frequently under Washington law referred to as “but for” causation. See, e.g., Hertog ex
 2 rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999).

3 A recent Washington case that exemplifies this rule is Sherman v. Pfizer, Inc., 8 Wn. App.
 4 2d. 686, 440 P.3d 1016 (2019). Plaintiff in the Sherman case sued both Pfizer and a physician.
 5 Plaintiff claimed Pfizer was liable because its package insert for a drug was not sufficient.
 6 However, the physician that actually administered the drugs stated he did not read the package
 7 inserts. In other words, the testimony showed the injury would have occurred regardless of the
 8 alleged negligence of the drug manufacturer because since the physician did not read the package
 9 insert, the alleged damage would have occurred anyway. Id. at 697-99.

10 This well-established Washington rule of proximate cause applies equally here. Plaintiff
 11 alleges and contends and submitted facts that even after an order for a gluten free diet was made,
 12 Plaintiff continued to receive food with gluten. Thus, regardless of whether Wellpath or any
 13 healthcare provider would have earlier ordered a gluten free diet, the alleged damage would have
 14 occurred regardless. This is because under the Plaintiff’s allegation, he still would have received
 15 food containing gluten.

16 3. There are no damages

17 The testimony from Plaintiff’s expert Dr. Huj Joel demonstrates Plaintiff cannot produce
 18 any damages for the actions of Wellpath. The testimony is that there is no evidence that Plaintiff
 19 consumed any gluten during the 35-hour period of Wellpath’s care. More significantly, even if he
 20 did, there is no evidence that caused him any type of damage during that short period of time
 21 because there is nothing showing that he lost weight or was sick in any manner during that 35-
 22 hour period. Unequivocally, Plaintiff cannot establish the damage element of a Washington
 23 common law negligence theory.

24

1 4. Additional Washington doctrines apply barring the negligence claim

2 It is undisputed that at the time intake Plaintiff affirmatively represented he was getting out
 3 the next day. In other words, approximately 12 hours from the time of intake. He also signed a
 4 “Refusal of Treatment” document. It stated in pertinent part:

5 I acknowledge that I am fully informed of and understand the above refused
 6 treatment and the risk involved in refusing. I hereby release and agree to hold
 7 harmless CCS and correctional personnel from all responsibility and any ill effects
 8 which may result from this refusal.

9 I have read this form and certified that I understand its contents.

10 It is undisputed Plaintiff signed the document. It is also undisputed he was not coerced in
 11 any way to sign it.

12 Plaintiff's voluntary signing of that release agreement releases Wellpath from any liability
 13 and certainly the negligence claim. “To prevail on his negligence claim (plaintiff) must establish
 14 that (defendant) owed him a duty of care. Whether there is a duty of care is a question of law. The
 15 Washington Supreme Court has recognized the right of parties ‘expressly to agree in advance that
 16 defendant is under no obligation of care for the benefit of the plaintiff, and should not be liable for
 17 the consequences of conduct which would otherwise be negligent.’” Chauvier v. Booth Creek
 18 Ski Holding, Inc., 109 Wn. App. 34, 35 P.3d 383 (2001); Kruse v. Hemp, 121 Wn.2d 715, 853
 19 P.2d 1373 (1993); Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992); Johnson
 20 v. NEW, Inc., 89 Wn. App. 309, 948 P.2d 877 (1997).

21 Plaintiff's signing of the release document here eliminates the duty element from the
 22 negligence action. Plaintiff does not have a Washington negligence claim because of him
 23 voluntarily executing that document.

24 Plaintiff is also equitably estopped from asserting claims against Wellpath. This is because
 25 of his affirmative acts of stating he was going to be released within 12 hours. Also, his affirmative

1 act of refusing to sign a release so medical records could be obtained. Also, in representing he
2 was not on a medical diet at the time of intake.

3 “The elements of equitable estoppel are (1) an admission, statement or act inconsistent with
4 the claim afterwards asserted, (2) actions by another in reliance upon the act, statement or
5 admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate
6 the prior act, statement or admission.” Board of Regence of University of Washington v. City of
7 Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). All three elements are met here. Plaintiff makes
8 several admissions and statements that are now inconsistent with the claim he is asserting. Clearly,
9 Wellpath relied on his statements. It relied on the statements in not attempting to order a gluten
10 free diet for Plaintiff at the time of admission. It has now been injured in having to defend this
11 action against Plaintiff. This theory also demonstrates the Washington state negligence claim
12 should be dismissed.

V. CONCLUSION

14 Plaintiff at the time of admission signed a document confirming he told Nurse Ward
15 (Crotty) that he was not on a medical diet. Although Plaintiff provided some self-serving
16 testimony initially, when pushed he finally admitted he does not recall his conversations with the
17 Wellpath nurse at the time of admission. Thus, there is no evidence for purposes of summary
18 judgment that Plaintiff requested a celiac diet when he met with Wellpath's agent on January 30,
19 2020. This is also the only reasonable conclusion that can be reached because Plaintiff wrongfully
20 believed he would be released from the jail within approximately the next 12 hours. In any event,
21 the undisputed conduct of Wellpath demonstrates that Plaintiff cannot establish either of his federal
22 claims under § 1983 or the Rehabilitation Act. There is no showing that Wellpath was deliberately
23 indifferent to Plaintiff's claims. The exact opposite is true. They attempted to assist him by getting
24 // /

Defendant Wellpath, LLC's
Motion for Summary Judgment - 25

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1 his medical records so celiac disease could be confirmed, but he refused to provide the release to
 2 them.

3 Plaintiff's state law claims are also deficient factually and legally. Certainly, there is no
 4 basis to establish the tort of outrage. There also is not sufficient evidence to establish a claim of
 5 negligent infliction of emotional distress. Moreover, to establish the negligence claim, Plaintiff
 6 needed a competent expert to state that the conduct of the Wellpath nurse was negligent and/or did
 7 not conform with the appropriate standard of care. Plaintiff has no such expert. All of Plaintiff's
 8 negligent-type claims must be dismissed under clear Washington precedent.

9 Plaintiff brought Wellpath into this matter late. Wellpath only provided care for a 35-hour
 10 period during Plaintiff's incarceration. All of these significant facts and applicable law establish
 11 summary judgment is appropriate here. This Court should dismiss all Plaintiff's allegations
 12 against Wellpath and grant its Motion for Summary Judgment.

13 DATED this 11th day of April, 2024.

14 _____
 15 s/ Jerome R. Aiken _____.
 16 JEROME R. AIKEN, WSBA #14647
 17 Attorneys for Defendant
 18 Wellpath, LLC
 Meyer, Fluegge & Tenney, P.S.
 Phone: 509/575-8500 – Fax: 509/575-4676
 Email: aiken@mftlaw.com

19 I certify that this motion contains 8302 words
 20 in compliance with the Local Civil Rules

21

22

23

24

CERTIFICATE OF TRANSMITTAL

I hereby certify under penalty of perjury under the laws of the State of Washington that on April 11, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

<p>For Plaintiff:</p> <p>Conrad Reynoldson / Marielle Maxwell Washington Civil & Disability Advocate 4115 Roosevelt Way NE, Suite B Seattle, WA 98105 <u>conrad@wacda.com / marielle@wacda.com</u></p>	<p><input checked="" type="checkbox"/> via CM/ECF <input type="checkbox"/> via E-Mail</p>
<p>Also for Plaintiff Pro Hove Vice:</p> <p>Mary C. Vargas / Michael S. Stein Stein & Vargas, LLP 10 G Street NE, Suite 600 Washington, DC 20002 <u>mary.vargas@steinvargas.com / michael.stein@steinvargas.com</u></p>	<p><input checked="" type="checkbox"/> via CM/ECF</p>
<p>Charles Weiner Law Office of Charles Weiner 501 Cambria Avenue Pensalem, PA 19020 <u>charles@charlesweinerlaw.com</u></p>	<p><input checked="" type="checkbox"/> via CM/ECF</p>
<p>For Deft Naphcare, Inc.:</p> <p>David A. Perez / Zachary E. Davison Michelle L. Maley / Mason Y. Ji Perkins Coie, LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101 <u>dperez@perkinscoie.com / zdavison@perkinscoie.com / mmaley@perkinscoie.com / mji@perkinscoie.com</u></p>	<p><input checked="" type="checkbox"/> via CM/ECF</p>
<p>For Defts Clark County Jail And Clark County:</p> <p>Mr. John E. Justice Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S. 2674 R.W. Johnson Road Tumwater, WA 98512 <u>jjustice@lldkb.com</u></p>	<p><input checked="" type="checkbox"/> via CM/ECF</p>

/s/ Sheryl A. Jones
SHERYL A. JONES, Legal Assistant